

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Ms Yueying LI

CASE NUMBER: 1406603

DIBP REFERENCE(S): CLF2014/21059

MEMBER: Glynis Bartley

DATE: 7 July 2015

PLACE OF DECISION: Sydney

DECISION: The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa:

- cl.820.211 of Schedule 2 to the Regulations
- cl.820.221 of Schedule 2 to the Regulations

•

•

07 July 2015 at 10:19am

Statement made on

APPLICATION FOR REVIEW

1. This is an application for review of a decision of a delegate of the Minister for Immigration to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant applied for the visa on 11 February 2014 on the basis of her relationship with her sponsor, Mr Mark Stephen Tracey. At that time, Class UK contained only one subclass: Subclass 820 (Partner (Temporary)). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on 20 March 2014 on the basis that the visa applicant did not satisfy cl.820.211 because the delegate was not satisfied that the applicant was in a genuine and continuing relationship with her sponsor.
4. The applicant appeared before the Tribunal via video conference from Brisbane on 23 June 2015 to give evidence and present arguments. The Tribunal also received oral evidence from the applicant's sponsor and from two witnesses; Mr Keith Mutch and Mr David Hellaby. The Tribunal hearing was conducted with the assistance of an interpreter in the Mandarin language.
5. The applicant was represented in relation to the review by her registered migration agent who attended the hearing by telephone. The migration agent's associate attended the hearing by video conference.
6. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

BACKGROUND

7. The applicant was born in China in 1963 and is a citizen of China. She is currently 51 years old. The applicant has declared one previous marriage in 1990 that ended in divorce in 2013. She has one child from that marriage, now aged 24 years. The applicant's father is deceased; her mother, one sister and the applicant's son live in China. The applicant has one sister living in Australia. The applicant was not employed at the time that she lodged the application. The applicant first travelled to Australia on 28 July 2013 on a Visitor visa (Subclass 600) which ceased on 5 March 2014. She departed Australia on 22 October 2013 and returned on 5 December 2013.
8. The applicant's sponsor was born in Australia in 1957 and is currently 57 years old. The sponsor has two daughters and one step-daughter from past de facto relationships. He has declared one previous marriage in 2004 that ended in divorce in 2009. There were no children from that marriage. The sponsor's parents are deceased. His six siblings (three brothers and three sisters) live in Australia. The sponsor is employed as a truck driver.
9. The parties stated that they met online in 2013 on a dating website. They first met in person on 20 August 2013 in Redcliffe and formed a committed relationship on 7 December 2013. The applicant and her sponsor were married in Deception Bay, Queensland, on 1 February 2014.
10. The parties provided documents to the Department in support of the application including but not limited to the following: documents related to their identities and marital status, submissions by the applicant's migration agent, photographs, a DVD of the parties' wedding,

copies of the sponsor's payslips, a copy of the parties' marriage certificate, statutory declarations by the sponsor's brother and two mutual friends and relationship statements by the applicant and her sponsor.

11. In the Record of Decision, a copy of which the applicant provided to the Tribunal, the delegate stated that no evidence had been provided regarding the financial aspects of the parties' relationship. He also found that the applicant and sponsor had not provided any documentary evidence that they were living together as a couple, sharing a household or the responsibilities of the household. The delegate acknowledged receipt of the witness statutory declarations and photographs; however statutory declarations indicate that they had known the applicant for a relatively short period of time and do not give any convincing reasons as to why they believe the relationship is genuine and continuing. The delegate was not satisfied that the parties presented themselves as a married couple to family and friends, or were regarded by others as such. The delegate said that the applicant and her sponsor had not provided any evidence that they had combined their affairs significantly or had changed the terms of their wills or superannuation to show that they see the relationship as a long term one. The delegate said that there was no evidence that the parties draw emotional support and companionship from one another or that they have a commitment to a shared life together.
12. Prior to and on the day of the hearing the applicant's migration agent provided additional documents to the Tribunal including but not limited to the following: statutory declarations by two mutual friends, accommodation receipts, joint utility accounts, documents regarding the purchase of a car, joint bank accounts statements, photographs, statutory declarations by the applicant and her sponsor, a letter from a Senior Pastor at Christ's Family Church, copies of the applicant's and sponsor's wills, a TAFE Confirmation of Enrolment in the applicant's name, a document showing the beneficiaries of the sponsor's superannuation and submissions by the applicant's migration agent.

CONSIDERATION OF CLAIMS AND EVIDENCE

13. The issue in the present case is whether the applicant was in a genuine and continuing spousal relationship with her sponsor at the time of application and continues to be in a genuine spousal relationship at the time of this decision.
14. In making its findings, the Tribunal has considered documents contained in the Department and Tribunal files as well as the oral evidence provided by the applicant, her sponsor and the witnesses at the hearing.
15. The oral evidence given by the applicant and her sponsor at the hearing regarding the circumstances in which they met, the development of their relationship and their living arrangements since December 2013 was coherent and consistent. The Tribunal considers them credible. The applicant's brother-in-law and a mutual friend also gave oral evidence in support of the application at the hearing. The witnesses gave their evidence in an open and straightforward manner and the Tribunal considers them reliable. The Tribunal accepts that the parties met in August 2013 and formed a de facto relationship in December 2013. The Tribunal accepts that they have been cohabiting continuously since then. The applicant and her sponsor were married in February 2014.

16. Whether the parties are in a spouse or de facto relationship

17. Clauses 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the sponsor who is an Australian citizen.

18. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as husband and wife to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion as to these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision.

ARE THE PARTIES VALIDLY MARRIED?

19. If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship. There is nothing in the information before the Tribunal to cast doubt on the validity of the parties' marriage in Queensland on 1 February 2014, and it was not disputed by the delegate. Consequently, in the absence of any evidence to the contrary, the Tribunal finds that the marriage between the applicant and the sponsor is a valid marriage for the purposes of the Migration Act, as required by s.5F(2)(a) of the Act.

CONSIDERATION OF ALL ASPECTS OF THE PARTIES' RELATIONSHIP

20. Financial aspects of the relationship

21. The applicant is not currently in paid employment. She has done some cleaning work on a casual basis since she arrived in Australia, but has found her lack of English a barrier to finding regular work. The sponsor is employed on a full-time basis as a truck driver. The parties reside in a two-bedroom apartment in Redcliffe, for which they pay \$250 per week rent. The sponsor is meeting the cost of the rent from his income.
22. The parties do not have any joint liabilities or assets. They opened a joint bank account in March 2014 and statements have been provided from that date. They show that the sponsor's salary is paid into the joint account. Usual expenditure on groceries, petrol stations and food outlets is shown. In April 2014 a transfer of almost \$30,000 was made into the parties' joint account. The applicant and her sponsor gave consistent evidence that the applicant's sister transferred the applicant's life savings from China on her behalf. That money was used to pay off the sponsor's credit card, to meet daily living expenses and also to assist with the purchase of a car. The car is in the sponsor's name because of the applicant's visa status and also because she does not drive. The Tribunal accepts on the basis of the parties' oral evidence that both the applicant and her sponsor use the joint account to meet their daily living expenses.
23. The applicant is being financially supported by the sponsor at present as she has not yet found regular work. The Tribunal accepts that the parties have pooled their financial resources and shared day-to-day household expenses using the applicant's savings from China.
24. The financial aspects of the parties' relationship are consistent with a genuine and continuing relationship.

25. Nature of the household

26. The Tribunal accepts on the basis of the parties' oral evidence, as well as the evidence of the witnesses at the hearing and the documents provided, that the applicant and her sponsor have been cohabiting since December 2013. Initially they were living together in the sponsor's rented home in Griffin, but in April 2014 they moved to a two-bedroom apartment

in Redcliffe. The parties gave consistent and persuasive evidence regarding the details of their accommodation and that evidence was supported by the other evidence before the Tribunal, including correspondence sent to the parties at mutual addresses.

27. The parties told the Tribunal that the applicant does the majority of the cooking and cleaning in the household, although the sponsor sometimes cooks casseroles and other particular dishes he enjoys because the applicant does not feel comfortable using an oven.
28. The applicant and her sponsor do not have any joint responsibility for the care and support of children.
29. The sponsor works shift work as a truck driver and generally starts work mid-afternoon and returns home in the early hours of the morning. The applicant cooks a large breakfast for the sponsor each morning, but they do not have evening meals together during the week because of the sponsor's work commitments.
30. The evidence of the establishment of a joint household provides significant weight in support of a finding of a genuine and continuing relationship.

31. *Social aspects of the relationship*

32. The applicant and her sponsor were married in Queensland in February 2014 and they provided photographs and a DVD of their wedding. The Tribunal accepts on the basis of that evidence that a number of the sponsor's family members, the applicant's sister and some of their mutual friends attended that event. In response to questioning, the sponsor told the Tribunal that his daughter and step-daughter did not attend the parties' wedding due to the logistical difficulties and cost associated with their attendance. The sponsor has not had contact with his eldest daughter for many years.
33. The parties have been on holiday together to Bribie Island, Stradbroke Island and Noosa with family and friends, as shown in the photographs provided. They gave evidence that they enjoy fishing and sightseeing with friends.
34. A letter from a local Senior Pastor of Christ's Family Church, Chandler, states that the parties attend church together most Sundays.
35. On the basis of the oral evidence of the parties and the witnesses, as well as the photographs and the witness statements, the Tribunal finds that the parties socialise together with their family and friends. The applicant and her sponsor demonstrated knowledge of the circumstances of each other's family members at the hearing. The applicant has met all but one of the sponsor's siblings and spends time with them intermittently. She has also met his children, except the eldest daughter, and grandchildren. The applicant's brother-in-law, Mr Mutch, gave evidence at the hearing that he and his wife socialise with the parties on a weekly basis. Mr Hellaby said that he sees the applicant and the sponsor once or twice a month and they attend each other's home for meals and eat out together. Witness statutory declarations and statements provided state that the parties go on outings and dinners with each other's families and their friends. Photographs show them with the sponsor's daughter, step-daughter and grandchildren.
36. The Tribunal is satisfied that the parties jointly plan and undertake social activities and represent themselves to other people as being married to each other. The Tribunal is also satisfied that in the opinion of family members, friends and relatives, the parties are in a genuine spousal relationship.

Nature of the persons' commitment to each other

37. The Tribunal finds that the parties have been in a committed relationship since December 2013 and have now been married for around 18 months. The parties gave consistent evidence that they kept in contact via Skype most days when the applicant returned to China on 22 October 2013 until she returned to Australia 5 December 2013.
38. The oral evidence and statements provided by witnesses attested to the genuineness of the parties' relationship. At the hearing the witnesses gave evidence that the applicant and her sponsor are loving and affectionate towards one another. Mr Hellaby told the Tribunal that the parties help and support each other. He said that they greatly enjoy one another's company.
39. The parties gave consistent evidence that the sponsor is assisting the applicant to improve her English and that they use various electronic aides to assist them to communicate, although the applicant's English has improved since the parties began cohabiting. The applicant and her sponsor gave evidence that their only source of conflict is due to frustration caused by their communication difficulties. Nonetheless, the sponsor gave evidence that they are both able to make themselves understood and are deeply committed to the relationship despite their language barrier.
40. The sponsor changed his employment when the parties formed a relationship because he was a long-distance truck driver and did not think it was fair to the applicant to be away for long periods at a time. That decision resulted in a significant reduction in his salary. The Tribunal considers that evidence demonstrates a significant level of commitment to the relationship on his part. The sponsor has also nominated the applicant as the beneficiary of his superannuation. Both the applicant and her sponsor have nominated one another as the beneficiary of each other's wills. The Tribunal notes that provision has been made for the parties' children.
41. The Tribunal is satisfied on the basis of the evidence before it that the applicant and her sponsor provide one another with emotional support and companionship. The Tribunal had the benefit of witnessing the parties interact at the hearing and their commitment to one another was obvious.
42. The parties demonstrated a detailed knowledge of each other's lives and routines at the hearing. They gave consistent evidence about their future plans, including visiting the applicant's family in China together and for the applicant to find work in Australia. The applicant and her sponsor presented as being committed to a long-term relationship. The degree of companionship and emotional support the parties clearly draw from one another provides significant weight in support of a finding that they are in a genuine and continuing relationship.

CONCLUSION

43. Given the above, the Tribunal is satisfied that at the time the visa application was lodged and at the time of this decision the parties are validly married, have a mutual commitment to a shared life as husband and wife to the exclusion of all others, and that the relationship is genuine and continuing. The Tribunal is satisfied that the parties live together and therefore do not live separately and apart on a permanent basis. Accordingly, the Tribunal finds that the applicant satisfies the definition of 'spouse' in s.5F(2)(a)-(d), and that the parties are in a spousal relationship.
44. The Tribunal is satisfied that the parties were in a genuine spousal relationship at the time of application and continue to be in a genuine and continuing relationship at the time of decision.

45. The applicant is not the holder of a Subclass 771 (Transit) visa. The Tribunal finds that the applicant is the spouse of her sponsor, who is an Australian citizen as evidenced by a copy of his birth certificate and passport, and is not prohibited from being a sponsoring partner. Accordingly the Tribunal finds that the requirements of cl.820.211(2)(a)(i) and (ii) are satisfied.
46. The Tribunal is satisfied that at the time of application the applicant was sponsored by her spouse, who had turned 18, in accordance with cl.820.211(2)(c)(i), and that the applicant held a substantive visa at the time of application, so cl.820.211(2)(d) is not applicable.
47. As the requirements of cl.820.211(2) are met, the Tribunal finds that cl.820.211 is satisfied.
48. The Tribunal further finds that at the time of the Tribunal's decision the applicant continues to be the sponsor's spouse, and continues to meet the requirements in cl.820.211(2), thus satisfying cl.820.221(1).
49. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

50. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa:
 - cl.820.211 of Schedule 2 to the Regulations
 - cl.820.221 of Schedule 2 to the Regulations

Glynis Bartley
Member

ATTACHMENT - EXTRACT FROM MIGRATION REGULATIONS 1994

1.15A SPOUSE

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).